

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOHN KARLOWITSCH,

Plaintiff,

v.

EVERGREEN RECREATIONAL
VEHICLES LLC, dba LIFESTYLE
LUXURY RV; and TIARA RV SALES,
INC.,

Defendants.

Case No. 2:14-cv-02159-MMD-VCF

ORDER

I. SUMMARY

This dispute involves the warranty for a Lifestyle 38RS recreational vehicle ("RV"). Before the Court are cross motions: Defendants Evergreen Recreational Vehicles, LLC, dba Lifestyle Luxury RV ("Evergreen") and Tiara RV Sales, Inc. ("Tiara")'s Motion for Summary Judgment (ECF No. 287; and Plaintiff John Karlowitsch's Motion for Summary Judgment (ECF. No. 31). The Court has reviewed the parties' respective responses (ECF Nos. 29, 39) and replies (ECF Nos. 45, 49).

Karlowitsch has additionally filed a Motion to Transfer to Northern District for Trial ("Motion to Transfer") (ECF No. 34), which Defendants oppose (ECF No. 37.)

For the reasons discussed below, all three motions are denied.

II. BACKGROUND

On November 19, 2013, Karlowitsch purchased an RV manufactured by Evergreen from Tiara, an authorized dealer. (ECF No. 1 ¶ 4.) Evergreen issued a

1 written warranty for the RV (“the Warranty”). (*Id.* ¶ 5.) The Warranty provides that
2 Evergreen will repair or replace defects in the RV for varying lengths of time depending
3 on the nature of the defect and subject to certain limitations. (ECF No. 28 at 18-21.)
4 Karlowitsch claims that the RV exhibited (and continues to exhibit) a number of
5 problems, some of which were immediately apparent, and others became apparent
6 during later use. (ECF No. 31 at 2-16.) Karlowitsch argues that Defendants have failed
7 to fix the defects, and he is therefore entitled to revoke his acceptance of the RV (*id.* at
8 16-21), and further is entitled to damages, attorney fees, and costs under the
9 Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 (*id.* at 21-29.).

10 Defendants argue that Karlowitsch has not produced any evidence showing that
11 they failed to honor the Warranty. (ECF No. 28 at 8.) Further, Defendants argue that
12 they have repaired everything covered by the Warranty, and they remain willing to make
13 additional repairs covered by the Warranty. (*Id.* at 11-12.)

14 Karlowitsch and Defendants have each moved for summary judgment on all
15 claims.

16 **III. LEGAL STANDARD**

17 “The purpose of summary judgment is to avoid unnecessary trials when there is
18 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,
19 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when “the
20 movant shows that there is no genuine dispute as to any material fact and the movant is
21 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Celotex Corp. v.*
22 *Catrett*, 477 U.S. 317, 322-23 (1986). An issue is “genuine” if there is a sufficient
23 evidentiary basis on which a reasonable fact-finder could find for the nonmoving party
24 and a dispute is “material” if it could affect the outcome of the suit under the governing
25 law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Where reasonable
26 minds could differ on the material facts at issue, however, summary judgment is not
27 appropriate. See *id.* at 250-51. “The amount of evidence necessary to raise a genuine
28 issue of material fact is enough ‘to require a jury or judge to resolve the parties’ differing

versions of the truth at trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

The moving party bears the burden of showing that there are no genuine issues of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements, the burden shifts to the party resisting the motion to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252.

Further, “when parties submit cross-motions for summary judgment, ‘[e]ach motion must be considered on its own merits.’” *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting William W. Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (Feb. 1992) (citations omitted). “In fulfilling its duty to review each

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1 cross-motion separately, the court must review the evidence submitted in support of
2 each cross-motion.” *Id.*

3 **IV. DISCUSSION**

4 As is evident from even a cursory look at the competing summary judgment
5 briefs, the parties disagree about a number of material facts. A large portion of the
6 parties’ respective briefs consists of explanations why the opposing party’s presentation
7 of undisputed facts are, in fact, disputed. (See, e.g., ECF No. 29 at 3-20; ECF No. 49 at
8 3-16.) For the reasons discussed below, these disagreements prevent the Court from
9 granting summary judgment in either party’s favor.

10 **A. Breach of Warranty**

11 Karlowitsch argues that Evergreen has failed to comply with the obligations in the
12 Warranty. Specifically, he argues that Evergreen has failed to, and continues to refuse
13 to, make repairs that are covered by the Warranty. Defendants argue that they have
14 made all repairs required by the Warranty.

15 The Magnuson-Moss Warranty Act (MMWA) dictates certain disclosure and
16 content requirements for written warranties. 15 U.S.C. § 2301 *et. seq.* The law also
17 creates a private right of action for a consumer when a warrantor has failed “to comply
18 with any obligation under . . . a written warranty, implied warranty, or service contract.” §
19 2310(d)(1); *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912, 917 (9th Cir.2005).
20 However, while the MMWA creates a private cause of action, the underlying claim relies
21 on state contract and warranty law. *Id.* at 918 (citing *Walsh v. Ford Motor Co.*, 807 F.2d
22 1000, 1016 (D.C.Cir.1986)). A plaintiff asserting a breach of warranty claim under
23 Nevada must prove that a warranty existed, the defendant breached the warranty, and
24 the defendant's breach was the proximate cause of the loss sustained. *Nevada Contract*
25 *Servs., Inc. v. Squirrel Companies, Inc.*, 68 P.3d 896, 899 (Nev. 2003).

26 Neither party disputes the existence of a written warranty; however the parties
27 dispute the two remaining elements. Karlowitsch argues that many warranty-covered
28 components of the RV continue to be in disrepair. (See, e.g., ECF No. 29 at 7, 10, 16.)

1 He also argues that certain repairs, even if completed, were not completed within a
2 reasonable amount of time. (ECF No. 31 at 22.) Lastly, he argues that he is unable to
3 sell or trade in the RV and that his truck has suffered damage due to the RV's faulty
4 breaks. (*Id.* at 15-16.) As evidence, he includes work logs, invoices, his own declaration,
5 several emails, answers to interrogatories, and an inspection report. (ECF Nos. 31-1,
6 31-2, 31-3, 31-4, 31-5.)

7 Defendants maintain that they performed all required maintenance under the
8 Warranty. They argue that any remaining problems fall outside of the Warranty because
9 they are cosmetic, have been caused by Karlowitsch himself, or have never been
10 brought to their attention. To rebut Karlowitsch's evidence, Defendants have produced
11 an inspection report which concludes that only "very minor convenience and/or cosmetic
12 items" remain in need of attention. (ECF No. 39 at 87.) They have also produced a
13 declaration from a customer care specialist indicating that just because something
14 appears on a work log, does not mean it was a repair that was covered by the warranty.
15 (*Id.* at 90.)

16 The resolution of Karowitsch's first claim turns on factual disputes about the
17 sufficiency of repairs and the nature of the defects he identifies. The parties have each
18 identified material disputes of fact upon which reasonable jurors could reach different
19 conclusions. Therefore, neither party is entitled to summary judgment on this claim.

20 **B. Revocation of Acceptance**

21 Karlowitsch argues that he purchased the RV, aware of certain problems, with
22 the understanding that the Warranty would cover any problems that were not obvious at
23 the time of sale. (ECF No. 31 at 19.) He further argues that Defendants failed to cure
24 the defects that became apparent, and he revoked acceptance within a reasonable
25 amount of time. (*Id.* at 20-21.) Once again, Defendants argue that they have complied
26 with the Warranty, and any unrepaired problems are not covered.

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1 In a decision allowing consumers to revoke acceptance of motorhomes from both
2 sellers and manufacturers, the Nevada Supreme Court explained:

3 The UCC provision governing revocation of acceptance was adopted and
4 codified in Nevada as NRS 104.2608. It allows a buyer to revoke her
5 acceptance of a purchased good if the item suffers from a “nonconformity
6 [that] substantially impairs its value to the buyer” and the buyer accepted
the item on the understanding that the seller would cure the nonconformity
or was induced into accepting a nonconforming item “either by the
difficulty of discovery before acceptance or by the seller's assurances.”

7 *Newmar Corp. v. McCrary*, 309 P.3d 1021, 1024 (Nev. 2013) (quoting NRS §
8 104.2608(1)(a) & (b).).

9 Karlowitsch’s second claim is based, in substantial part, on the same facts as his
10 first claim. As discussed above, there is a factual dispute about whether the RV “suffers
11 from a nonconformity that substantially impairs its value” and whether any such
12 nonconformity has been cured by Defendants. The parties have each produced
13 evidence that could lead a reasonable fact finder to different conclusions. Therefore, the
14 motions for summary judgment are denied on Karlowitsch’s second claim as well.

15 **V. MOTION TO TRANSFER**

16 Karlowitsch’s Motion to Transfer asks the Court to move the trial in this case from
17 Nevada’s unofficial southern division in Las Vegas to its unofficial northern division in
18 Reno. (ECF No. 34.) Defendants oppose the motion and argue that transferring the
19 case this late would “drive up the costs for the Defendants to appear for trial.” (ECF No.
20 37 at 2.)

21 The District of Nevada is divided into two unofficial divisions, and the local rules
22 permit a presiding judge to move a trial from one division to another. LRs IA 1-6, 1-8(c).
23 Under 28 U.S.C. § 1404(a), a district court has discretion to “adjudicate motions for
24 transfer according to an individualized, case-by-case consideration of convenience and
25 fairness.” *Jones v.. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir.2000) (citing *Stewart*
26 *Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). When the defendant is the party seeking
27 transfer, the plaintiff’s choice of forum is “entitled to ‘paramount consideration’ and the
28 moving party must show that a balancing of interests weighs heavily in favor of

1 transfer.” *Galli v. Travelhost, Inc.*, 603 F.Supp. 1260, 1262 (D.Nev.1985). Normally the
2 burden is on the defendant to make the strong showing that a change of venue is
3 warranted. See *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th
4 Cir.1986); *Galli*, 603 F.Supp. at 1262. This case, however, does not present the typical
5 transfer scenario because Plaintiff, who chose the forum in the first instance, now seeks
6 transfer. The reasons supporting deference to a plaintiff’s original choice of forum are
7 not as strong when the plaintiff changes its mind later in litigation.

8 The Court finds that transferring to the unofficial Northern District this late in the
9 litigation, after Defendants hired counsel located in Las Vegas, and after discovery has
10 closed and dispositive motions have been filed, would be unfairly prejudicial to
11 Defendants. Therefore, the Motion to Transfer is denied.

12 VI. CONCLUSION


13 The Court notes that the parties made several arguments and cited to several
14 cases not discussed above. The Court has reviewed these arguments and cases and
15 determines that they do not warrant discussion because they do not affect the outcome
16 of the parties’ motions.

17 It is therefore ordered that Defendants’ Motion for Summary Judgment (ECF No.
18 28) is denied.

19 It is further ordered that Plaintiff’s Motion for Summary Judgment (ECF No. 31) is
20 denied.

21 It is further ordered that Plaintiff’s Motion to Transfer to Northern District for Trial
22 (ECF No. 34) is denied.

23 DATED THIS 12th day of September 2016.

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25 
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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